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No. 71-1158

In the Supreme Court of the United States

OCTOBER TERM, 1971

THOMAS S. CROW AND SAUL BROURMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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After a trial by jury in the United States District Court for the Western District of Pennsylvania, petitioners were convicted on counts 3 and 4 of a nine-count indictment, charging fraud in the sale of securities, in violation of 15 U.S.C. 77 (q)(a). Each was sentenced on count 3 to thirty days' imprisonment and a fine of $3,000 and on count 4 to a suspended sentence of imprisonment for two years and three years' probation. The court of appeals affirmed (Pet. App. B).

Petitioners' only contention is that they were denied their right to a speedy trial by reason of pre-indictment delay. In answer to this contention we rely upon the opinion of the court of appeals which carefully and correctly applied the holdings of *United States* v. *Marion*, 404 U.S. 307, to the facts of this similar case (Pet. App. B. 18).

The only matter not fully dealt with in the opinion below is the claim made here that the decision in *United States* v. *Marion* was *obiter dictum* insofar as it dealt with Rule 48(b), Fed.R.Crim.P., and is not controlling on that point (Pet. 6-10). This contention is without merit. The appellees in *Marion* contested the right of the government to appeal directly to this Court on the ground that the district judge had acted only in his discretionary capacity in sustaining the defense motion to dismiss the indictment for pre-indictment delay (Marion br. p. 9, Cratch br. pp. 2-3).

Dealing with the jurisdictional question, the Court pointed out that this was a shift of position by the appellees, 404 U.S. at 312:

> The motion rested on constitutional grounds exclusively, and neither the motion, the arguments of counsel, the Court's oral opinion, nor its judgment mentioned Rule 48(b), Federal Rules of Criminal Procedure, as a ground for dismissal. Our jurisdiction to hear this appeal has been satisfactorily established.

In addition to this jurisdictional argument, however, the appellees in *Marion* urged on the merits

that the district court's ruling was a ~~prior~~ after exercise of discretion under Rule 48(b) (Marion br. pp. 10-11, Cratch br. pp. 3-5). The Court answered these contentions in two footnotes, 404 U.S. 312 n.4, 319 n.11, indicating that the Rule was limited to post-arrest situations (404 U.S. at 319).

Moreover the language of Rule 48(b) is:

> If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant *who has been held to answer to the district court*, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint. [Emphasis supplied.]

In *Hoopengarner* v. *United States*, 270 F. 2d 465, 469 (C.A. 6), cited in *Marion* at 319 n.11, the court in interpreting this language said:

> There was no unnecessary delay in the prosecution of the defendant after he had been held to answer. As to the delay from the time of the commission of the offense to the commencement of the criminal proceedings, that is controlled by the Statute of Limitations, which is not here in question.

This is the interpretation accepted in *Nickens* v. *United States*, 323 F. 2d 808, 809-810 (C.A. D.C.), certiorari denied, 379 U.S. 905; *Harlow* v. *United States*, 301 F. 2d 361, 366 (C.A. 5), certiorari denied, 371 U.S. 814, and *United States* v. *Hoffa*, 205 F.Supp. 710 (S.D. Fla.), all of which were cited by the court in *Marion*, 404 U.S. at 319 n.11. The dis-

cussion in *Marion* of Rule 48(b) is dispositive of this case.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.

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